

GREGORY L. KELLY,
Plaintiff,
v.
MICHAEL J. ASTRUE,
Commissioner of Social
Security,
Defendant.

No. CV-07-378-CI
ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND REMANDING FOR ADDITIONAL
PROCEEDINGS PURSUANT TO
SENTENCE FOUR 42 U.S.C. §
405(g)

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 13, 15.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney David R. Johnson represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings.

Plaintiff Gregory L. Kelly (Plaintiff) protectively filed for Supplemental Security Income and disability insurance benefits (DIB) on April 12, 2005. (Tr. 117, 123.) Plaintiff alleged an onset date of October 20, 2002. (Tr. 117, 123.) Benefits were denied

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1 initially and on reconsideration. (Tr. 87, 95.) Plaintiff requested
2 a hearing before an administrative law judge (ALJ), which was held
3 before ALJ Mary Reed on August 22, 2006. (Tr. 33-81.) Plaintiff was
4 represented by counsel and testified at the hearing. (Tr. 37-73.)
5 Vocational expert Tom Moreland also testified. (Tr. 73-80.) The ALJ
6 denied benefits (Tr. 16) and, after considering additional evidence,
7 the Appeals Council denied review. (Tr. 5.) The instant matter is
8 before this court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF FACTS**

10 The facts of the case are set forth in the administrative hearing
11 transcripts, the ALJ's decision, and the briefs of Plaintiff and the
12 Commissioner, and will therefore only be summarized here.

13 At the time of the hearing, Plaintiff was 43 years old. (Tr.
14 37.) Plaintiff has a high school diploma and was a cook in the Army
15 for about a year and a half. (Tr. 38.) Plaintiff's past work
16 experience includes warehouse work, driving a forklift, millwork,
17 mixing paint, and construction labor (Tr. 38-47.) Plaintiff alleges
18 disability due to left knee pain and depression. (Tr. 120, 123.)

19 **STANDARD OF REVIEW**

20 Congress has provided a limited scope of judicial review of a
21 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the
22 Commissioner's decision, made through an ALJ, when the determination
23 is not based on legal error and is supported by substantial evidence.
24 *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v.*
25 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's]
26 determination that a plaintiff is not disabled will be upheld if the
27 findings of fact are supported by substantial evidence." *Delgado v.*

1 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)).
2 Substantial evidence is more than a mere scintilla, *Sorenson v.*
3 *Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a
4 preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir.
5 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
6 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence
7 as a reasonable mind might accept as adequate to support a
8 conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
9 (citations omitted). "[S]uch inferences and conclusions as the
10 [Commissioner] may reasonably draw from the evidence" will also be
11 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
12 review, the court considers the record as a whole, not just the
13 evidence supporting the decision of the Commissioner. *Weetman v.*
14 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v. Harris*,
15 648 F.2d 525, 526 (9th Cir. 1980)).

16 It is the role of the trier of fact, not this court, to resolve
17 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
18 supports more than one rational interpretation, the court may not
19 substitute its judgment for that of the Commissioner. *Tackett*, 180
20 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
21 Nevertheless, a decision supported by substantial evidence will still
22 be set aside if the proper legal standards were not applied in
23 weighing the evidence and making the decision. *Browner v. Sec'y of*
24 *Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus,
25 if there is substantial evidence to support the administrative
26 findings, or if there is conflicting evidence that will support a
27 finding of either disability or nondisability, the finding of the

1 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
2 1230 (9th Cir. 1987).

3 SEQUENTIAL PROCESS

4 The Social Security Act (the "Act") defines "disability" as the
5 "inability to engage in any substantial gainful activity by reason of
6 any medically determinable physical or mental impairment which can be
7 expected to result in death or which has lasted or can be expected to
8 last for a continuous period of not less than twelve months." 42
9 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that
10 a Plaintiff shall be determined to be under a disability only if his
11 impairments are of such severity that Plaintiff is not only unable to
12 do his previous work but cannot, considering Plaintiff's age,
13 education and work experiences, engage in any other substantial
14 gainful work which exists in the national economy. 42 U.S.C. §§
15 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability
16 consists of both medical and vocational components. *Edlund v.*
17 *Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

18 The Commissioner has established a five-step sequential
19 evaluation process for determining whether a claimant is disabled. 20
20 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
21 engaged in substantial gainful activities. If the claimant is engaged
22 in substantial gainful activities, benefits are denied. 20 C.F.R. §§
23 404.1520(a)(4)(I), 416.920(a)(4)(I).

24 If the claimant is not engaged in substantial gainful activities,
25 the decision maker proceeds to step two, which determines whether the
26 claimant has a medically severe impairment or combination of
27 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If

1 the claimant does not have a severe impairment or combination of
2 impairments, the disability claim is denied.

3 If the impairment is severe, the evaluation proceeds to the third
4 step, which compares the claimant's impairment with a number of listed
5 impairments acknowledged by the Commissioner to be so severe as to
6 preclude substantial gainful activity. 20 C.F.R. §§
7 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App.
8 1. If the impairment meets or equals one of the listed impairments,
9 the claimant is conclusively presumed to be disabled.

10 If the impairment is not one conclusively presumed to be
11 disabling, the evaluation proceeds to the fourth step, which
12 determines whether the impairment prevents the claimant from
13 performing work he or she has performed in the past. If plaintiff is
14 able to perform his or her previous work, the claimant is not
15 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
16 this step, the claimant's residual functional capacity ("RFC")
17 assessment is considered.

18 If the claimant cannot perform this work, the fifth and final
19 step in the process determines whether the claimant is able to perform
20 other work in the national economy in view of his or her residual
21 functional capacity and age, education and past work experience. 20
22 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482
23 U.S. 137 (1987).

24 The initial burden of proof rests upon the claimant to establish
25 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
26 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
27 1111, 1113 (9th Cir. 1999). The initial burden is met once the
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1 claimant establishes that a physical or mental impairment prevents him
2 from engaging in his or her previous occupation. The burden then
3 shifts, at step five, to the Commissioner to show that (1) the
4 claimant can perform other substantial gainful activity, and (2) a
5 "significant number of jobs exist in the national economy" which the
6 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
7 1984).

8 **ALJ'S FINDINGS**

9 At step one of the sequential evaluation process, the ALJ found
10 Plaintiff has not engaged in substantial gainful activity at any time
11 relevant to the decision. (Tr. 18.) At steps two and three, he found
12 Plaintiff has the severe impairments of left knee pain, obesity,
13 asthma, depressive disorder, and personality disorder, not otherwise
14 specified, but the impairments do not meet or medically equal one of
15 the listed impairments in 20 C.F.R., Appendix 1, Subpart P,
16 Regulations No. 4 (Listings). (Tr. 18, 24.) The ALJ then determined
17 Plaintiff retains the residual functional capacity to perform light
18 exertion. (Tr. 25.) The ALJ concluded:

19 He can lift and carry 10 pounds frequently and 20 pounds
20 occasionally. He can stand and walk 6 hours in an 8-hour
21 day. He can sit 6 hours in an 8-hour day. He can
22 occasionally climb stairs and ramps. He should avoid
23 climbing ropes, ladders, or scaffolds. He can occasionally
24 engage in kneeling, stooping, crouching, and crawling. He
25 should avoid concentrated exposure to dust, fumes, odors,
26 and air particulates. He should avoid hazards and
27 unprotected heights. He is capable of superficial, limited
28 interaction with coworkers and the public. He is capable of
understanding, remembering, and carrying out simple,
repetitive tasks.

(Tr. 25.) At step four, the ALJ found Plaintiff is unable to perform
his past relevant work. (Tr. 30.) Based on vocational expert
testimony and the Plaintiff's age, education, work experience and

1 residual functional capacity, the ALJ concluded there are jobs that
2 exist in significant numbers in the national economy the claimant can
3 perform. (Tr. 30.) As such, the ALJ found Plaintiff was not under
4 a disability as defined in the Social Security Act at any time through
5 the date of the decision. (Tr. 31.)

6 **ISSUES**

7 The question is whether the ALJ's decision is supported by
8 substantial evidence and free of legal error. Specifically, Plaintiff
9 argues the ALJ erred by: (1) not including all of Plaintiff's physical
10 and mental limitations in the residual functional capacity
11 determination; (2) improperly rejecting medical opinions supportive of
12 greater limitations; and (3) rejecting Plaintiff's testimony. (Ct.
13 Rec. 14 at 12-18.) Defendant argues the ALJ correctly considered the
14 medical and testimonial evidence to determine Plaintiff's residual
15 functional capacity. (Ct. Rec. 15 at 7.)

16 **DISCUSSION**

17 **A. Credibility**

18 Plaintiff asserts the ALJ erred by not identifying which
19 testimony was not credible and by failing to identify specific facts
20 supporting her finding. (Ct. Rec. 14 at 16.) More specifically,
21 Plaintiff argues the ALJ did not state why Plaintiff's testimony
22 regarding his inability to walk more than two blocks at a time, stand
23 no more than five minutes at a time and difficulty with bending was
24 not credible. (Ct. Rec. 14 at 16.) Plaintiff also alleges the ALJ
25 did not identify facts in the record leading to the conclusion that
26 these symptoms are not credible. (Ct. Rec. 14 at 16.) Defendant
27 argues the ALJ properly discredited Plaintiff's testimony alleging
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1 limitations greater than those assessed in the residual functional
2 capacity finding. (Ct. Rec. 15 at 13.)

3 In social security proceedings, the claimant must prove the
4 existence of a physical or mental impairment by providing medical
5 evidence consisting of signs, symptoms, and laboratory findings; the
6 claimant's own statement of symptoms alone will not suffice. 20
7 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
8 the basis of a medically determinable impairment which can be shown to
9 be the cause of the symptoms. 20 C.F.R. § 416.929. In making an RFC
10 determination, the ALJ is required to take into account all of the
11 Plaintiff's symptoms, including pain, to the extent they are
12 reasonably consistent with the medical and other evidence in the
13 record. 20 C.F.R. §§ 404.1529, 416.929; S.S.R. 96-8p.

14 Once medical evidence of an underlying impairment has been shown,
15 medical findings are not required to support the alleged severity of
16 the symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).
17 If there is evidence of a medically determinable impairment likely to
18 cause an alleged symptom, the ALJ must provide specific and cogent
19 reasons for rejecting a claimant's subjective complaints. *Id.* at 346.
20 The ALJ may not discredit pain testimony merely because a claimant's
21 reported degree of pain is unsupported by objective medical findings.
22 *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). The following
23 factors may also be considered: (1) the claimant's reputation for
24 truthfulness; (2) inconsistencies in the claimant's testimony or
25 between his testimony and his conduct; (3) claimant's daily living
26 activities; (4) claimant's work record; and (5) testimony from
27 physicians or third parties concerning the nature, severity, and

1 effect of claimant's condition. *Thomas v. Barnhart*, 278 F.3d 947, 958
2 (9th Cir. 2002).

3 If the ALJ finds the claimant's testimony about the severity of
4 the claimant's pain and impairments is unreliable, the ALJ must make
5 a credibility determination with findings sufficiently specific to
6 permit the court to conclude that the ALJ did not arbitrarily
7 discredit claimant's testimony. *Id.* The ALJ's reasons must be
8 supported by "clear and convincing" evidence. *Lingenfelter v. Astrue*,
9 504 F.3d 1028, 1038-39 (9th Cir. 2007); *Vertigan v. Halter*, 260 F.3d
10 1044, 1050 (9th Cir. 2001); *Morgan*, 169 F.3d at 599.

11 In this case, there is no evidence of malingering, so the ALJ's
12 finding must be based on clear and convincing evidence. With respect
13 to Plaintiff's credibility, the ALJ stated, "Having considered the
14 claimant's assertion of disability, the undersigned finds that his
15 subjective complaints regarding the extent of his functional
16 limitations are not fully credible." (Tr. 26.) The ALJ then listed
17 detailed facts supporting the finding.

18 The ALJ pointed out that, despite allegations of significant pain
19 in his left knee, Plaintiff takes no pain medication other than
20 ibuprofen or extra strength Tylenol for relief. (Tr. 26, 54-55.) The
21 type, dosage, effectiveness and side effects of medication taken to
22 alleviate pain or other symptoms is relevant in evaluating the
23 intensity and persistence of symptoms. 20 C.F.R. §§ 416.929(c)(3)(iv)
24 and 416.929.(c)(3)(v). The ALJ also noted the Plaintiff is
25 noncompliant with recommended treatments. (Tr. 27.) Plaintiff
26 admitted he does not wear a knee brace, although a brace was provided
27 to him. (Tr. 65, 258.) He has continued to smoke despite advice that
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1 smoking aggravates his asthma. (Tr. 266, 274.) He stopped
2 antidepressant medication yet complained of depression. (Tr. 274.)
3 Noncompliance with a recommended course of treatment without good
4 cause is relevant to a disability claim. 20 C.F.R. § 404.1530. The
5 ALJ properly considered Plaintiff's use of nonprescription medication
6 and failure to comply with medical treatment in assessing Plaintiff's
7 credibility.

8 The ALJ also cited a number of inconsistent and contradictory
9 statements made by Plaintiff throughout the record. (Tr. 26-27.)
10 "One strong indication of the credibility of an individual's
11 statements is their consistency, both internally and with other
12 information in the case record." S.S.R. 96-7p. Plaintiff testified
13 that his asthma limited his activities (Tr. 48-51), but the medical
14 record shows it is well-controlled with medication. (Tr. 346.) To one
15 health care provider, he reported that although he had been depressed
16 for many years, he never took any medication. (Tr. 250.) Less than
17 a month later, he reported to another provider that he had taken
18 Celexa in the past. (Tr. 219.) The ALJ also observed Plaintiff was
19 not forthcoming about his criminal history throughout the record.¹
20 (Tr. 61-62, 64, 71-72.) Additional inconsistencies noted by the ALJ

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22 ¹It is noted that the ALJ mentioned Plaintiff's lack of
23 forthrightness regarding his criminal history rather than the criminal
24 history itself as a factor in considering Plaintiff's credibility.
25 Defendant's argument that Plaintiff's criminal record "involved crimes
26 of dishonesty" is erroneous and Plaintiff's criminal record is not
27 relevant to the disability proceeding except as mentioned by the ALJ.
28 See *U.S. v. Glen*, 667 F.2d 1269, 1272-73 (9th Cir. 1982).

1 include omissions from the Plaintiff's reported work history (Tr. 38-
2 47, 140, 146, 245) and reports of weight gain.² (Tr. 248, 260, 305.)

3 The ALJ also pointed out Plaintiff's inconsistent statements
4 regarding alcohol use. Conflicting or inconsistent testimony
5 concerning alcohol use can contribute to an adverse credibility
6 finding. *Robbins. v. Soc. Sec. Admin.*, 466 F.3d 880, 884 (9th Cir.
7 2006). Plaintiff denied alcohol treatment at the hearing (Tr. 61),
8 then later admitted to it when confronted with evidence. (Tr. 64,
9 291.³) He also reported no drug or alcohol use to Dr. Czysz during a

11 ²The ALJ noted other inconsistencies in Plaintiff's reporting,
12 although they were not specifically included in the explanation of the
13 credibility finding. (Tr. 21 n.1, Tr. 22.) Plaintiff told hospital
14 examiners in June of 2004 that he had been more reclusive in recent
15 months (Tr. 359), but notes from his regular medical providers during
16 that time frame do not reflect such complaints. (Tr. 260-65.) At a
17 July 2004 follow-up appointment, Plaintiff did not mention any
18 depressive symptoms. (Tr. 266.) In November, 2004, Plaintiff told
19 Dr. Lemere he had taken Wellbutrin a year ago without much help (Tr.
20 243), but in November 2003, Plaintiff reported to Dr. Millman that he
21 had a very good response to Wellbutrin. (Tr. 258.)

23 ³The ALJ cited Exhibit 2F, a report by Dr. Morris, as evidence in
24 the record showing Plaintiff had attended an alcohol treatment
25 program. (Tr. 26, 222.) During the hearing, however, the ALJ referred
26 to Dr. Bailey's report, Exhibit 8F, as indicating that Plaintiff
27 attended alcohol treatment. (Tr. 64, 291.) It is noted that Dr.
28 Morris' report does not mention Plaintiff's past alcohol treatment;

1 psychological evaluation on April 12, 2004, (Tr. 236) yet testified he
2 probably had a drinking problem until August 2004. (Tr. 62-64.) As
3 the ALJ pointed out, the record reflects that Plaintiff reported
4 drinking at least occasionally (Tr. 62, 223, 250, 349) and one
5 evaluator noted that he smelled of alcohol. (Tr. 218.)

6 The ALJ also cited several comments by Plaintiff's physicians
7 which suggest Plaintiff's credibility may be questionable. (Tr. 27.)
8 Dr. Bailey noted indications of secondary gain. (Tr. 292, 293.) Dr.
9 Lee noted Plaintiff complained of significant depression but joked his
10 way through the interview. (Tr. 288.) The ALJ also cited Dr.
11 Bailey's notes indicating that Plaintiff reported not being able to
12 work due to lack of motivation, but that Plaintiff was motivated to do
13 what needed to be done to keep GAU. (Tr. 292.) These comments by
14 Plaintiff's examining psychologists, while not conclusive on their
15 own, are evidence supporting the ALJ's credibility determination.

16 Plaintiff's assertion that the ALJ was not sufficiently specific
17 in discrediting plaintiff's testimony and supporting the credibility
18 finding is without merit. The ALJ cited numerous facts supporting the
19 conclusion that Plaintiff is less than credible. While the ALJ did
20 not specifically comment on the Plaintiff's testimony regarding his
21 inability to walk more than two blocks at a time, stand no more than
22 five minutes at a time and difficulty with bending in the credibility
23 finding, the ALJ referred to Plaintiff's testimony about those alleged

24 therefore, the ALJ's reference to Exhibit 2F in this context is
25 erroneous. However, the error is harmless as it is not significant to
26 the ultimate finding of nondisability. See *Stout v. Comm'r, Soc.*
27 *Sec'y Admin.*, 454 F.3d 1050, 155-56 (9th Cir. 2006).

1 limitations in her explanation. The facts cited by the ALJ constitute
2 clear and convincing reasons for the ALJ's credibility finding. The
3 ALJ drew reasonable inferences from the evidence and supported her
4 finding with specificity sufficient to indicate that the ALJ did not
5 arbitrarily discount Plaintiff's testimony.

6 **B. Opinion Evidence**

7 In making a residual functional capacity determination, the ALJ
8 must consider the opinions of acceptable medical sources about the
9 nature and severity of the Plaintiff's impairments and limitations.

10 20 C.F.R. §§ 404.1527, 416.927; S.S.R. 96-2p; S.S.R. 96-6p. A
11 treating or examining physician's opinion is given more weight than
12 that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587,
13 592 (9th Cir. 2004). If the treating or examining physician's
14 opinions are not contradicted, they can be rejected only with clear
15 and convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
16 1996). If contradicted, the ALJ may reject the opinion if he states
17 specific, legitimate reasons that are supported by substantial
18 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d
19 1453, 1463 (9th Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747,
20 753 (9th Cir. 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989).
21 Historically, the courts have recognized conflicting medical evidence,
22 the absence of regular medical treatment during the alleged period of
23 disability, and the lack of medical support for doctors' reports based
24 substantially on a claimant's subjective complaints of pain, as
25 specific, legitimate reasons for disregarding the treating physician's
26 opinion. See *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604.

1 **1. Psychological Opinions**

2 Plaintiff asserts the ALJ improperly rejected psychological
3 opinions by rejecting them to the extent they are inconsistent with
4 her findings. (Ct. Rec. 14 at 17.) Plaintiff argues this is not a
5 specific and legitimate reason for rejecting opinions of examining
6 physicians. (Ct. Rec. 14 at 17.) The ALJ stated, "In conclusion,
7 these assessments and opinions are rejected to the extent they are
8 inconsistent with the findings of the undersigned." (Tr. 30.) As
9 indicated by the phrase, "In conclusion," the ALJ's statement was a
10 summary of her analysis of the psychological evidence which spanned
11 more than two pages. (Tr. 28-30.) The ALJ discussed the
12 psychological evaluations in detail, noting inconsistencies or
13 weaknesses and, where appropriate, assigned weight to the opinions.
14 The ALJ provided substantial evidence supported by the record for the
15 weight given to each psychological opinion. The use of a general
16 statement to summarize specific findings is not error.⁴

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19 ⁴Plaintiff also cites limitations assessed by Dr. Dalley and
20 asserts they should have been included in the RFC finding. (Ct. Rec.
21 14 at 17.) As Defendant points out, the assessment by Dr. Dalley
22 occurred in July, 2007, almost a year after the ALJ's decision. (Ct.
23 Rec. 16 at 17, Tr. 446, 447.) The report is properly considered by
24 the court because the Appeals Council considered it in denying
25 Plaintiff's request for review, *see Harman v. Apfel*, 211 F.3d 1172,
26 1180 (9th Cir. 2000); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir.
27 1993), but evidence obtained after the ALJ has issued an adverse
28 determination is less persuasive. *See Weetman v. Sullivan*, 877 F.2d

1 Plaintiff also cites the opinion of Dr. Kathleen Lee and
2 emphasizes her assessment of a Global Assessment of Functioning
3 (GAF) score of 50.⁵ (Ct. Rec. 14 at 16-17.) Although Plaintiff's
4 argument is unclear, he seems to imply that the ALJ erred by rejecting
5 the serious impairments suggested by Dr. Lee's GAF score. However,
6 the Commissioner has explicitly disavowed use of GAF scores as
7 indicators of disability. "The GAF scale . . . does not have a direct
8 correlation to the severity requirements in our mental disorder
9 listing." 65 Fed. Reg. 50746-01, 50765 (August 21, 2000). Furthermore,
10 as the ALJ pointed out, Dr. Lee noted no anxiety disorder and
11 concluded Plaintiff could do simple and complex tasks and
12 appropriately interact with others. (Tr. 28, 289.) She stated
13 Plaintiff "may" have difficulties with attendance, but as the ALJ
14 noted, Dr. Lee attributed such potential difficulties to Plaintiff's
15 description of his symptoms. (Tr. 28, 289.) As discussed above, the
16 ALJ's unfavorable credibility determination is adequately supported,

17 _____
18 20, 23 (9th Cir. 1989). After-the-fact psychiatric findings are also
19 "notoriously unreliable." See *Vincent v. Heckler*, 739 F.2d 1393, 1395
20 (9th Cir. 1984). Dr. Dalley's report was therefore accorded little
21 weight. Further, the diagnoses of anxiety disorder and personality
22 disorder (Tr. 450) were addressed and rejected by the ALJ. (Tr. 28.)
23 The report also contains numerous references to Plaintiff's reported
24 symptoms which the ALJ properly discredited as discussed elsewhere in
25 this opinion.

26 ⁵A GAF score of 41-50 indicates serious symptoms or any serious
27 impairment in social, occupation, or school functioning. DIAGNOSTIC AND
28 STATISTICAL MANUAL OF MENTAL DISORDERS, 4TH Ed. at 32.

1 so Dr. Lee's opinion regarding work attendance was duly rejected by
2 the ALJ.

3 Plaintiff also asserts that the ALJ should have discussed why the
4 state agency psychological consultants' assessed limitations regarding
5 mental impairments were not consistent with the record. Plaintiff's
6 argument is not entirely clear; Plaintiff seems to argue that because
7 the ALJ stated the limitations assessed by the state agency
8 consultants with respect to Plaintiff's physical impairments were
9 "more in keeping with the record as a whole" (Tr. 27), the ALJ was
10 required to either adopt the same position with respect to state
11 agency assessed mental impairments or specifically explain why the
12 opinion is not in keeping with the record as a whole. This argument
13 is without merit. Although a physical RFC assessment may be
14 consistent with the record, it does not follow that a mental RFC
15 assessment must also be consistent with the record.

16 Plaintiff implies that the ALJ rejected the state agency
17 physicians' opinion without adequate explanation. (Ct. Rec. 14 at
18 18.) However, the ALJ mostly accepted the opinion of the state agency
19 reviewing psychologists. The ALJ's step two finding was consistent
20 with the consulting psychologists' opinion. (Tr. 18, 28.) As the
21 Defendant points out, the ALJ's RFC finding actually includes
22 limitations greater than those identified in the reviewing
23 psychologists' narrative. (Ct. Rec. 16 at 17-18.) The state agency
24 psychologists opined, "[Claimant] is capable of simple and some
25 complex tasks" (Tr. 320), while the RFC finding includes only simple
26 tasks. (Tr. 25.) The consulting psychologists indicated Plaintiff
27 "is capable of relating appropriately to a supervisor, coworkers and
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1 public," (Tr. 320); yet the ALJ assessed the limitation of
2 "superficial, limited interactions with coworkers and the public."
3 (Tr. 25.)

4 Although the ALJ is required to consider and explain the weight
5 given to state agency consultants, S.S.R. 96-6p, no specific language
6 is required to reject all or a portion of a report. *See Magallenes v.*
7 *Bowen*, 881 F.2d 747, 755 (9th Cir. 1989). The court may draw
8 reasonable inferences from the ALJ's discussion of a particular
9 medical report. *Id.* The ALJ need not discuss all evidence presented,
10 but must explain why significant probative evidence has been rejected.
11 *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). The mark-
12 the-box responses of the nonexamining physicians are based on a review
13 of other evidence in the record which the ALJ evaluated in detail
14 throughout the decision. They are not particularly probative or
15 significant since they are not explained in the narrative. The ALJ
16 reasonably rejected the state agency consulting psychologists' report
17 to the extent it differed with her RFC finding.

18 The ALJ properly considered the psychological evidence and
19 provided specific, legitimate reasons supported by substantial
20 evidence in the record for her assessment of the evidence. Thus, the
21 ALJ did not err.

22 **2. Medical Opinions**

23 Plaintiff argues the ALJ improperly rejected the opinion of Dr.
24 Jan Mueller, a treating physician. (Ct. Rec. 14 at 13-14.) On a DSHS
25 Physical Evaluation form dated November 1, 2005, Dr. Mueller assessed
26 moderate limitations due to arthralgia of the knee and obesity. (Tr.
27 309.) Dr. Mueller indicated restrictions in bending, climbing,
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1 crouching and kneeling as tolerated and stated that Plaintiff was
2 unable to walk more than 2 blocks at a time. (Tr. 309.) Dr. Mueller
3 opined that Plaintiff's work level is sedentary. (Tr. 309.) The ALJ
4 rejected Dr. Mueller's opinion. (Tr. 27.) Dr. Mueller's opinion is
5 in conflict with the August 31, 2005, opinion of the state agency
6 consulting physicians who assessed a work level of "light work" and
7 occasional postural limitations in climbing, kneeling and crawling.
8 (Tr. 338, 343.) Thus, the ALJ was required to provide specific,
9 legitimate reasons supported by the record to reject Dr. Mueller's
10 opinion. See *Flaten*, 44 F.3d at 1463.

11 The ALJ gave several reasons for rejecting Dr. Mueller's opinion.
12 First, the ALJ pointed that although Dr. Mueller opined Plaintiff was
13 limited to sedentary work and was unable to walk more than two blocks
14 at a time, an MRI conducted shortly after Dr. Mueller's November 1,
15 2005, opinion did not show a meniscus tear. (Tr. 27.) A May 2003 MRI
16 showed a partial tear of the anterior cruciate ligament (Tr. 21, 283),
17 but a subsequent x-ray in July 2004 was negative. (Tr. 19, 21, 266,
18 397.) The ALJ noted Plaintiff reported to another provider, Dr.
19 Millman, in July 2004 that an orthopedic specialist at the University
20 of Washington told him it was just arthritis and a ligament injury was
21 not suspected, and surgery was not offered.⁶ (Tr. 21, 266.) On
22 November 1, 2005, Dr. Mueller completed the DSHS Physical Evaluation
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24
25 ⁶Although the July 8, 2004, x-ray conducted at the University of
26 Washington medical center indicates it was ordered by Dr. Green of the
27 Knee Sports Medicine Clinic (Tr. 397), the record does not contain any
28 additional records from Dr. Green or the Sports Medicine Clinic.

1 Form and ordered another MRI.⁷ (Tr. 307, 308-11.) Three days later,
2 on November 4, 2005, an MRI showed mild prepatellar bursitis, no
3 hypoplasia, and cysts on the ACL consistent with a partial tear or
4 dissecting synovial cyst. (Tr. 24, 315.) The MRI also showed no
5 meniscal tears. (Tr. 315.) As the ALJ pointed out, at a follow up
6 appointment on December 6, 2005, Dr. Mueller noted the MRI did not
7 show a meniscal tear and Plaintiff's pain was well controlled with
8 ibuprofen. (Tr. 24, 27, 312.)

9 The ALJ does not explain her reasoning, but implies that the
10 results of the 2005 MRI directly undermine Dr. Mueller's opinion.
11 (Tr. 27.) However, if the MRI results were essential to Dr. Mueller's
12 opinion, he would have waited for them before completing the DSHS
13 evaluation. He evidently considered Plaintiff to be limited to
14 sedentary work notwithstanding the results of the MRI. (Tr. 309.) Dr.
15 Mueller identified "arthralgic knee," not a torn meniscus, as a source
16 of Plaintiff's limitations (Tr. 309), so the MRI showing no meniscal
17 tear is not conclusively inconsistent with the diagnosis.
18 Furthermore, Dr. Mueller referenced an x-ray of the knee as the
19 diagnostic basis for his opinion and did not mention an MRI when
20 requested to list any additional tests or consultations needed. (Tr.
21 310.) The ALJ did not discuss Dr. Mueller's reference to an x-ray or

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23 ⁷Despite Plaintiff's assertion that Dr. Mueller had all of
24 Plaintiff's records (Ct. Rec. 14 at 14), the record does not reflect
25 whether Dr. Mueller had access to and reviewed Plaintiff's medical
26 records before making his assessment. Dr. Mueller's notes do indicate
27 Plaintiff reported he had been treated at the University of Washington
28 Sports Medicine Clinic. (Tr. 305.)

1 analyze whether it was a proper objective basis for the assessment,
2 and did not explain how the post-opinion MRI results affect the
3 validity of Dr. Mueller's opinion. It was not reasonable to conclude
4 that the results of the 2005 MRI invalidated Dr. Mueller's opinion
5 without analyzing the basis of that opinion. As such, the 2005 MRI is
6 not an appropriate reason to discount Dr. Mueller's opinion.

7 The second reason cited by the ALJ for rejecting Dr. Mueller's
8 opinion is his note that Plaintiff's pain was well controlled with
9 ibuprofen.⁸ (Tr. 27, 312.) The lack of prescription medication is a
10 legitimate consideration in evaluating the limitations assessed by Dr.
11 Mueller, but it is not by itself a specific, legitimate reason for
12 rejecting the doctor's opinion.

13 The third reason given for rejecting Dr. Mueller's opinion is the
14 state agency medical consultants indicated Plaintiff was capable of
15 light exertion, "which is more in keeping with the record as a whole,
16 based upon the objective findings subsequent to Dr. Mueller's
17 opinion." (Tr. 27.) Plaintiff argues this is not a legitimate basis
18 for rejecting Dr. Mueller's opinion and suggests the ALJ improperly
19 adopted the opinion of nonexamining physicians over the opinion of a
20 treating physician. (Ct. Rec. 14 at 14-15.) In appropriate
21 circumstances, opinions from state agency medical consultants may be
22 entitled to greater weight than the opinions of treating or examining
23 sources. S.S.R. 96-6p. The opinion of a non-examining physician may
24 be accepted as substantial evidence if it is supported by other
25 evidence in the record and is consistent with it. *Andrews v. Shalala*,

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27 ⁸Plaintiff did not challenge this reason for rejecting Dr.
28 Mueller's opinion.

1 53 F.3d 1035, 1043 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d 821, 830-
2 31 (9th Cir. 1995). The opinion of a non-examining physician cannot
3 by itself constitute substantial evidence that justifies the rejection
4 of the opinion of either an examining physician or a treating
5 physician. *Lester*, 81 F.3d at 831, citing *Pitzer v. Sullivan*, 908
6 F.2d 502, 506 n.4 (9th Cir. 1990). Cases have upheld the rejection of
7 an examining or treating physician based on part on the testimony of
8 a non-examining medical advisor; but those opinions have also included
9 reasons to reject the opinions of examining and treating physicians
10 that were independent of the non-examining doctor's opinion. *Lester*,
11 81 F.3d at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th
12 Cir. 1989) (reliance on laboratory test results, contrary reports from
13 examining physicians and testimony from claimant that conflicted with
14 treating physician's opinion); *Roberts v. Shalala*, 66 F.3d 179 (9th
15 Cir. 1995) (rejection of examining psychologist's functional
16 assessment which conflicted with his own written report and test
17 results). Thus, case law requires not only an opinion from the
18 consulting physician, but also substantial evidence (more than a mere
19 scintilla but less than a preponderance), independent of that opinion
20 which supports the rejection of contrary conclusions by examining or
21 treating physicians. *Andrews*, 53 F.3d at 1039.

22 Here, the ALJ did not identify substantial independent evidence
23 justifying adoption of state agency medical consultant's opinion over
24 the treating physician's opinion. The ALJ said only that the state
25 agency consultant's opinion Plaintiff is capable of a wide range of
26 exertion is "more in keeping with the record as a whole." (Tr. 27.)
27 The ALJ did not cite to the record or list any facts supporting this
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1 assertion, except for a vague reference to "objective findings
2 subsequent to Dr. Mueller's opinion," presumably the 2005 MRI. As
3 discussed above, the ALJ did not explain how the 2005 MRI is more
4 consistent with the record as a whole than Dr. Mueller's opinion.
5 Thus, the ALJ's third reason for discounting Dr. Mueller's opinion is
6 inadequately supported.

7 The fourth reason given by the ALJ for rejecting Dr. Mueller's
8 opinion, was that the assessment Plaintiff is unable to walk more than
9 2 blocks at a time was inconsistent with the bulk of the medical
10 evidence. (Tr. 27.) Plaintiff argues the ALJ did not specifically
11 identify the "bulk of the medical evidence" and, therefore, this basis
12 for rejecting Dr. Mueller's opinion is improper. (Ct. Rec. 14 at 15.)
13 The record reflects the ALJ did not describe testimony, list
14 representative examples, or cite to the record to demonstrate that the
15 "bulk of" the evidence indicates Plaintiff is able to walk more than
16 two blocks. Elsewhere in the record, the ALJ noted Plaintiff's
17 reports of walking 10 blocks in May 2003 (Tr. 19, 254), 20 minutes per
18 day in January 2004 (Tr. 20, 260), and for 3 hours in June 2004. (Tr.
19 21, 359.) However, Dr. Mueller assessed Plaintiff in November 2005,
20 more than a year after Plaintiff last reported more extensive walking.
21 The ALJ did not explain how Dr. Mueller's assessment that Plaintiff
22 could not walk more than two blocks at a time was inconsistent with
23 the medical evidence. Thus, the ALJ was not sufficiently specific in
24 asserting this reason for rejecting Dr. Mueller's opinion.

25 The ALJ cited three inadequate reasons and one proper
26 consideration in rejecting Dr. Mueller's opinion. While situations
27 may arise in which only one proper reason justifies the rejection of
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1 a treating physician's opinion, this is not one of them. Dr.
2 Mueller's note that Plaintiff's pain was well controlled by ibuprofen
3 does not constitute a specific, legitimate reason supported by
4 substantial evidence in the record. Therefore, Dr. Mueller's opinion
5 was improperly rejected by the ALJ.

6 While other reasons may exist to reject Dr. Mueller's assessment,
7 the court is constrained to review only those reasons asserted by the
8 ALJ. *Sec. Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947);
9 *Pinto V. Massanari*, 249 F.3d 840, 847-48 (9th Cir. 2001). Here, the
10 ALJ failed to provide sufficient reasoning for rejecting the opinion
11 of Dr. Mueller, a treating physician. There are two remedies where
12 the ALJ fails to provide adequate reasons for rejecting the opinions
13 of a treating or examining physician. The general rule, found in the
14 *Lester* line of cases, is that "we credit that opinion as a matter of
15 law." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996); *Pitzer v.*
16 *Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990); *Hammock v. Bowen*, 879 F.2d
17 498, 502 (9th Cir. 1989). Another approach is found in *McAllister v.*
18 *Sullivan*, 888 F.2d 599 (9th Cir. 1989), which holds a court may remand
19 to allow the ALJ to provide the requisite specific and legitimate
20 reasons for disregarding the opinion. See also *Benecke v. Barnhart*,
21 379 F.3d 587, 594 (9th Cir. 2004) (court has flexibility in crediting
22 testimony if substantial questions remain as to claimant's credibility
23 and other issues). Where evidence has been identified that may be a
24 basis for a finding, but the findings are not articulated, remand is
25 the proper disposition. *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th
26 Cir. 1990) (citing *McAllister*); *Gonzalez v. Sullivan*, 914 F.2d 1197,
27 1202 (9th Cir. 1990). In this case, remand is the proper remedy.

Having reviewed the record and the ALJ's findings, the court concludes the ALJ's decision is not supported by substantial evidence and is based on legal error. On remand, the ALJ shall properly consider the medical opinion evidence and make a new RFC determination. The testimony of a medical expert may be helpful. Accordingly,

1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is **GRANTED**. The matter is remanded to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C. § 405(g).

3. An application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

DATED January 26, 2009.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND REMANDING FOR ADDITIONAL PROCEEDINGS PURSUANT TO
SENTENCE FOUR 42 U.S.C. § 405(g)-24